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Before the  
**FEDERAL COMMUNICATIONS COMMISSION** RECEIVED  
Washington, D.C. 20554

In the Matter of )

Improving Public Safety Communications )  
in the 800 MHz Band )

Consolidating the 900 MHz Industrial/Land )  
Transportation and Business Pool Channels )

To: The Commission

JAN 10 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

WT Docket No. 02-55

**Comments of Small Business In Telecommunications To**  
**Supplemental Comments of The Consensus Parties**

January 10, 2003

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## Summary

The PWC has stated to the Commission that its plan, as articulated within the Supplement, must be accepted by the Commission without material change or the plan must be deemed **unreliably** supported by its signatories and, thus, fatally flawed. However, as clearly shown herein, the PWC plan cannot be accepted "as is". It is **lacking** in legal foundation. It is blind to and **inconsistent with** the rights of incumbent licensees which rights are **protected** by federal statute. It is lacking in **necessary** specifics regarding the contractual rights and duties among Nextel, the proposed 1.9 Ghz licensees (and the agent/trustee of the licensees' shares of stock), the Fund Administrator, the proposed entity called the RCC, the Planning Committees, and affected licensees. Adoption would create violations of the Commission's long established rules and decisions relevant to **licensing**, real parties in interest, and **making** application to the Commission. It will result in economic waste. It is bereft of **consideration** of due process under law. And, it fails to provide necessary funding assurances. In the final analysis, it fails.

Perhaps its greatest failure is that it never moves beyond the voluntary to the enforceable. At no juncture has the PWC requested, for examples, that the Commission order Nextel to pay \$850 million dollars: order NPI to pay the cost of its own relocation: order licensees to waive their protections granted under 47 U.S.C. §303; order licensees to rely on the Nextel-provided funding source until that funding proves inadequate: or order Nextel and its newly created 1.9 Ghz licensees to enter into contracts to secure funding. Instead, the PWC plan requests that the Commission simply recognize the PWC's intentions and base the creation of rules on these intentions between private contracting parties.

Equally disturbing is the PWC's failure, again and again and again, to explain or even attempt to articulate the legal authority upon which the Commission might rely in adopting the extra-legal suggestions of the PWC. Since adoption of the PWC plan would require that the agency make legally enforceable its decision, that decision would require the agency to order parties to take particular actions. What the PWC fails to do at every turn is to discuss or find any authority upon which the agency might rely in adopting the orders which would be required to give the necessary legal imprimatur to the PWC's machinations, *i.e.* make law. For example, although there is more than a serious question regarding whether the agency could order Nextel to pay \$850 million into a privately operated fund (SBT has found no basis for such an order under Title 47 or other federal statute, given the procedural status of these matters), absent such an order the agency is without necessary legal authority to enforce the necessary funding of the PWC plan. Therefore, if the agency cannot order the funding (in fact, the PWC plan does not contemplate such an order) then the entire plan collapses as fully unfunded under law.

Nor is the PWC requesting that the agency make any factual findings upon which to base its orders. The PWC does not request a finding of unlawful behavior on behalf of interfering CMRS operators, although ample evidence exists. Instead, the PWC tacitly suggests that the harm to public safety operations and other analog systems be treated like Acts of God, fully unforeseeable and outside the control of regulatees. This is not true as the PWC's initial comments and many other commenting parties have made clear. The effect on public safety operations from the operation of low-site cellularized systems was known and ignored by interfering CMRS operators. The false premise which has propelled the PWC is that such operations are lawful. They are not when the

result of such operations is the creation of harmful interference to other systems. Were this false premise finally jettisoned from the discussion regarding interference at 800 MHz, the agency's path would be entirely clear. The responsibility to remedy the harmful interference would rest upon the interfering CMRS operators, without regard to the operations of other, legitimately licensed, innocent operators. In sum, the PWC asks the Commission to violate law to cover up violations of law. One is reminded of the old chestnut of "two wrongs not making a right."

That the IWC has been fully coopted by and through its negotiations with Nextel is obvious. There is nothing within the IWC plan which suggests independent reasoning on the part of the participants. It is a brokered deal and the terms of the deal show clearly the identity of the party with the most perceived leverage in those negotiations – Nextel. Following adoption of the proposed plan, all operators excepting Nextel are placed under a threat of license revocation for failure to walk lockstep in the unfunded relocation. All planning committees and coordination efforts would be made only with Nextel's participation and undue influence. And all risk of success would fall on public safety entities and others who would be forced to rely upon private contractual relations for which none (including the Commission) is granted standing to enforce. The most the PWC promises adversely affected licensees is "consideration" of their interests. This is not enough. Affected licensees are entitled to all rights granted under law. Expedient administration of Nextel's business agenda is an insufficient reason for denial of those rights.

SBT strongly urges the Commission to reject the PWC plan. Despite its many moving parts and copious pages of attachments which falsely suggest that all issues have been considered and

resolved, the plan fails to provide the most essential characteristics of reasoned decision making and lawful adoption of rules. It totally fails to take into account facts and law. And although the Commission might consider whether its discretionary authority extends to the far reaches necessary to encompass the requests of the PWC plan, even the expertise of the agency cannot supply the private contractual terms upon which the PWC plan would rest. The PWC plan does not provide them and the agency cannot supply them. And absent those facts, the agency is unable to move to adopt the PWC plan.

For those reasons stated above and those reasons fully articulated within these Comments, SBT respectfully requests that the agency reject the PWC plan and look toward the interfering CMRS operators for remedial actions consistent with SBT's earlier filed comments within this proceeding.

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WT Docket No. 02-55

To: The Commission

**Comments of Small Business In Telecommunications To  
Supplemental Comments of The Consensus' Parties**

Pursuant to that Public Notice entitled *Wireless Telecommunications Bureau Seeks Comment On "Supplemental Comments Of The Consensus Parties" Filed In The 800 MHz Public Safety Interference Proceeding - WT Docket No. 02-55*, DA 03-19 (released January 3, 2003). Small Business in Telecommunications (SBT) hereby submits its comments in opposition to that document entitled "Supplemental Comments of the Consensus Parties" (Supplement) dated December 74, 2007 filed within this proceeding by those parties referenced therein as the Private Wireless Coalition (PWC). SBT respectfully requests that the instant document be included within the record of this proceeding as a necessary response to that Supplement, which response could not have been made previously.

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<sup>1</sup> As recognized by the WTB, the parties style themselves the "Consensus Parties" and that the use of the word "consensus" only denotes temporary agreement among the signatories. To avoid confusion, SRT will refer to the group as the PWC.

### The Coalition Lacks Vital Support

The PWC's list of supporting organizations and corporate sponsors continues to lack vital support from interested persons. Absent from the list are any representatives of the utility industry, a heavy user of X00 MHz spectrum. Although numerous utility companies, including its representative organization UTC, filed comprehensive comments with the Commission in this proceeding, the PWC's efforts have not netted a single member of that industry for support of its plan. The plan has been roundly rejected by the utility industry in earlier comments and nothing contained within the Supplement appears designed to accommodate the valid concerns of those entities which are a portion of the industry segment generally referred to as Critical Infrastructure Industries (CII).

Conspicuously missing from the ranks of the PWC is Nextel Partners, Inc. (NPI). Provided with months of additional time between the filing of its Reply comments and its new Supplement position, the PWC still has not been joined by NPI. Nextel Communications, Inc. (Nextel) is a minority, non-controlling shareholder in NPI, not the parent of NPI. Accordingly, NPI's vast numbers of licenses and channels must be removed from any equation, engineering or claims made by the PWC to bolster its brokered deal.

Also missing is support from the airline industry, Southern LINC, or commenting cellular entities. Further missing is any entity which represents those businesses and groups that would be adversely affected by the Commission's grant of a nationwide license to Nextel for the coveted 1.9 Ghz spectrum. Neither NAM, MRFAC nor SBT have rejoined the fold of PWC membership, each



having left, in some part, due to the broad concessions to Nextel which the PWC plan proposes. Motorola, the leading supplier of 800 MHz equipment, is not a part of the IWC and neither is any other manufacturer of equipment, many of which filed comments in this proceeding.

Accordingly, the PWC's claims regarding its representative nature of the affected persons and industries which rely on the 800 MHz spectrum for operations and growth is belied by the numerous lacunas in vital support. The claimed consensus is not an agreement among all or even nearly all of the affected members of the industry. Instead, it is a brokered deal among its signatories, produced in private meetings without input from the Commission, non-members or the public. Both the manner and results of those meetings in the form of the PWC's newest efforts go to the weight of the claims made within the plan and undermine any assumptions regarding the viability of the plan as a working model.

#### The Tenuous Nature of the Coalition

The Commission may note that the PWC is not built on a solid foundation. Although its members have signed off on the present Supplement, each member's participation is conditional and may be withdrawn if the plan is not adopted by the agency exactly as designed by the PWC. Reading more like contract than comment, the PWC has clearly stated more than once in its Supplement, "the Consensus Plan must be adopted as a whole; any material changes will jeopardize the voluntary commitments of the affected licensees and their representative associations essential to successful implementation." Supplement at pages iv-v. The Supplement does not define the phrase "material

changes” within its admonitions to the agency, therefore, the effect of any changes in the plan via customary rule making efforts is left unknown.

If, for example, the agency indicated that the plan is not sufficiently funded ( a real possibility) or that the organizations which would oversee the coordination efforts are not correctly chosen, what then of the PWC’s vaunted coalition? The clear conclusion is that the coalition would be no more and its alleged consensus would be fractured or, at the least, rendered wholly unreliable.

What the plan is, then, is not a set of comments but a contract among its members for which it seeks ratification from the agency. Lacking ratification of the entire deal, the deal is off the table and the Supplement, including all comments made therein, are to be treated as a nullity. If not deemed a nullity, at least without support from any signing members. It would be as though comments had been filed anonymously and, therefore, the entirety of the Supplement should rightfully be viewed as unsigned and unsponsored, since its members cannot agree or, at least have not articulated, what portions of the plan represent *quid pro quo* among its members pursuant to private, unpublished negotiations and are, therefore, inviolable in the eyes of one or more of its signatories.

## The Plan Lacks Necessary Legal Support

Although numerous commenting parties, most notably SBT, have seriously questioned the PWC plan on those issues related to necessary statutory authority held by the agency to adopt, in whole or in part, the PWC plan, the Supplement does not address these basic concerns. In fact, the supplemented PWC plan creates additional conflicts with law and the rights of licensees.

### **Funding**

The area of greatest disagreement is the funding mechanism of the PWC plan. Although the organizations that will together administer the proposed funding may be purely motivated to act in the public interest, the fact remains that the funding is neither by rule or law. The PWC does not propose that the agency create a rule which states, in essence, "Nextel is hereby ordered to deposit up to \$850 million in a privately administered account to be employed for the purpose of financing the PWC plan."<sup>2</sup> Yet, absent this type of codified or adjudicated decree, the entire funding mechanism is wholly speculative and unenforceable. This essential portion of the PWC plan simply has no basis under law and cannot be employed for the purpose of forwarding the coalition's efforts. Extralegal financing mechanisms, based on voluntary cooperation, among wholly private entities, not subject to agency oversight, and lacking any foundation under Title 47 for the purpose of establishment, much less official recognition, cannot serve as the basis for rule making. To date, the PWC has not cited any statutory authority which would demonstrate the agency's ability to accept

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<sup>2</sup> In the unlikely event that the Commission were to adopt the PWC funding proposal, SBT respectfully requests that the agency decide that all affected 800 and 900 MHz licensees fall within that class of persons for whose benefit the agency's order is made for the purpose of providing to each such licensee those protections provided by 47 U.S.C. §§407 & 411 in the event that the funding is not timely forthcoming.

the PWC's funding mechanism as a basis for adoption of the plan. And lacking that statutory authority, the agency's adoption of the PWC plan would be outside of its mandate and the strict confines of its authority related to licensing and compensation of licensees that are ordered to suffer relocation.

One of the obvious problems is that the amount pledged by Nextel is capped. The agency has never adopted a capped approach to a party's obligations to finance relocation of licensees. The very nature of restricting the obligations of a party seeking to relocate another entity's system for the moving party's benefit, would result in an immediate finding of arbitrariness contrary to law. If the PWC and Nextel sincerely believe, as is stated within the Supplement, that the final tab for relocating all 800 MHz systems to accommodate the PWC plan is no more than \$850 million, then the risk for that belief should be placed squarely on the persons making those claims and attempting to derive from those claims an advantage in future licensing and operation.<sup>3</sup> Whatever method is ultimately chosen by the Commission, if any, to finance any rebanding of the 800 MHz spectrum should neither penalize innocent, non-interfering licensees; nor should it be capped. The vagaries of circumstances among the thousands of unique facilities and the effect of time on costs and an untold number of other factors require a highly flexible approach to funding. And, of paramount importance, the funding vehicle must be certain.

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<sup>3</sup> The PWC is not wholly convinced, despite its showings, that Nextel's estimation of costs and ability to pay are accurate or dependable. For one of many examples within the plan, at Page 7 of the Supplement, the PWC addresses the possibility that Nextel's commitment may "prove inadequate." In such event, the rebanding process would not be continued, left only partially accomplished, with all attendant problems that such circumstances would create.

Further complicating the matter is that Nextel's "funding offer was and is expressly conditioned on"<sup>4</sup> the Commission adopting without material change the PWC plan and grant to Nextel of the coveted 10 MHz of spectrum at 1.9 GHz. The Commission's authority under Section 309 does not contemplate this method for issuance of licenses. Section 309 directs the agency to issue licenses pursuant to competitive bidding or other mechanisms based on engineering, etc.; but the Act does not grant authority to the agency to grant a license based on a party's voluntary commitment to place money in a privately administered account, no matter for what the account may be used. Section 309 also directs the agency, although not as a primary mandate, to take those actions which would return to the U.S. Treasury the value of spectrum licensed to private entities. Since the U.S. Treasury would not see a dime of Nextel's voluntary contributions, one can assume that the PWC did not take into account this element of the agency's Congressional directions.

SBT can find no legal or statutory authority for the Commission's adoption of the PWC funding mechanism as proposed. There exists no penumbras of Title 47 upon which it might rest, much less any specific language cited by the PWC in support. Ignoring the call for such support by commenting parties, the PWC has moved blithely forward in formulating its tenuous coalition based on the proposals within the Supplement, without expending any effort to address these threshold issues. Having failed to address these issues, even remotely, the Commission is left to assume that the PWC has no answers and chooses, instead, an underlying hope that the agency will ignore the problem in adopting the PWC plan. However, the Commission is not positioned to ignore the limits

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<sup>4</sup> Supplement at Ftn. 6.

of its authority and must act in accord with statute. Accordingly, the IWC plan must fail as a basis for rebanding.

## **Licensing Issues**

Although SBT has expressed *supra*, its strong disagreement with the funding mechanism of the PWC plan, and has further questioned seriously the agency's authority to grant to Nextel authority to operate on the relevant 1.9 Ghz spectrum as a result of the voluntary financial commitment of Nextel to the plan, the PWC's proposals further complicate the legal issues underlying its plan via the introduction of a new corporate entity, to be created by Nextel for the purpose of securing that financial commitment. At Page 8 of the Supplement, the PWC describes this entity and its purpose as follows:

**Nextel will secure its ability to fund the Plan retuning costs by setting up a separate corporate entity(ies), the purpose of which is to hold assets to secure the Nextel funding obligation. The stock of the entity(ies) will be pledged to an escrow agent/trustee, with the power to sell the assets and hold the cash proceeds in escrow for the benefit of the Fund Administrator in the event that Nextel fails to meet its payment obligations under the Plan. The assets to be held in the corporate entity(ies) will be the 10 MHz of replacement spectrum in the 1.9 Ghz band for which Nextel will be granted licenses upon the effective date of the Report and Order. Nextel's commitment to the funding is further cemented by its additional, immediate contribution of its 700 MHz band licenses with a minimum value of \$354,711,000.'**

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<sup>5</sup> The last sentence of this paragraph is fully unexplained. Nextel's return of its unused 700 MHz licenses does nothing to forward funding of the PWC plan, unless (and it is not wholly clear) the PWC assumes that the amount paid by Nextel at auction is deemed a portion of its \$850 million voluntary commitment. Additionally, there is nothing within the record that demonstrates that the 700 MHz licenses offered by Nextel are worth the amount paid at auction. In fact, the economic realities of the marketplace, which have driven down the value of spectrum since Nextel made its purchase, fully belie this claim.

Accordingly, the entity(ies) created to secure Nextel's, as yet, voluntary pledge would also create a corporate veil against imposition of liability directly on Nextel for any violation of that same pledge. Absent Nextel's further action to act as guarantor of the created entities' debt to the Fund Administrator, no other possible conclusion exists.

Additionally, the agency is left in a quandary in deciding the identity of the person controlling these newly created companies for the purpose of fulfilling the Commission's obligation to assure eligibility and accountability from its licensees. Apparently, all of the stock is pledged to the agent/trustee, which entity is not identified further by the PWC proposal. The agent/trustee is granted all power to sell the assets and hold the cash proceeds outside of the entity(ies) control. It appears, therefore, that Nextel is requesting that any license granted to it for operation at 1.9 Ghz be granted not to Nextel, but its designee, provided however, *de jure* control of the stock and assets of each designee would be placed in the hands of a third entity, which presumably would be deemed to be the controlling person for the purpose of meeting the obligations of compliance with the agency rules. Therefore, the licensing problem created by the PWC proposal is whether the Commission, consistent with its past rules and decisions, can separate stock ownership from operation of the assets in determining the identity of the real party in interest controlling a licensee!"

Reflecting momentarily on the earlier discussed difficulties of legal authority for adoption of the PWC plan and applying necessarily those issues here for the purpose of clarification, at Page

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<sup>6</sup> Oddly, the PWC plan would have Nextel exercise *de facto* control via construction and operation of the 1.9 Ghz facilities, while the agent/trustee exercises *de jure* control, thus, there is no control left for the named licensee to exercise.

8 of the Supplement the PWC is asking the Commission to recognize and base an adoption of rules on private contractual (though not yet formed or fully articulated) obligations regarding funding of no more than \$850 million, which recognition would move the agency to grant exclusive licenses to (not Nextel, the allegedly contributing party) but to some unidentified and, as yet, unformed entity(ies), which company(ies) would not construct or operate facilities under those licenses (Nextel has reserved this right to itself within the proposal at Footnote 9 of the Supplement) and would not hold its own stock (the agent/trustee would hold that) and which entity(ies) presumably could not prevent the sale of its assets, in whole or in part, if its obligations to a Fund Administrator were not satisfied. This accurate representation of this entity(ies) begs the question of why it/they would be created in the first instance. Certainly, Nextel would not be creating companies that would exist as “licensees” as that term has been defined over many years of Commission decisions. Licensees are responsible for their actions in compliance with agency regulations. These are not. They are merely paper vehicles without form or substance or duty, except to produce a name for issuance of a Commission authorization. Accordingly, these proposed entities must be found to be ineligible to hold grant of the 1.9 Ghz licenses for the purposes proposed. The PWC does not appear to have considered these issues within its proposals, however, the problem of making the proposal consistent with Commission rule and precedent certainly rests squarely with the coalition.

The only reasons for the creation of these not-nearly-licensee entities would be to (1) create a corporate veil to insulate Nextel from any direct liability to the Fund Administrator arising out of those voluntary pledges made within the plan and (2) to allow those entities to employ the 1.9 Ghz licenses as collateral with funding institutions to finance payments to the Fund Administrator and/or



to build out the systems licensed thereunder. Neither reason is consistent with the need for great assurance in funding rebanding and, instead, serve as accommodations to Nextel to place "off book" these debts. SBT takes no position on Nextel's chosen financial machinations, except as those machinations would reduce or eliminate Nextel's feigned obligations created under the PWC plan.

### **Essential Information For Reasoned Decision Making**

As the agency is fully aware, it must have gathered all necessary facts for the purpose of supporting any rule making decision. A failure to gather necessary facts or to have those facts offered on the record, subjects the decisions of the agency to scrutiny by the courts to determine whether such decisions are either arbitrary or capricious and, thus, subject to reversal or remand. The PWC plan fails to provide to the Commission necessary information for adoption of the plan for any purpose. Given the volumes of information and charts attached to the PWC plan, the opportunity obviously existed for providing all such information. Yet, many of the most important legal aspects of the PWC plan are fully lacking, except in a manner which is so general in nature as to be fully vague and unreliable. They are:

- The specific terms of the contract between Nextel and the RCC or Fund Administrator, providing that specific pledge language regarding Nextel's voluntary contribution(s)
- The specific terms of the contract between each of the 1.9 Ghz licensee entities and its agent/trustee

- The specific terms of the contracts, if appropriate, between the agent/trustees and the RCC or Fund Administrator
- The specific terms of the contract between Nextel and the 1.9 Ghz licensee entities, including the manner by which Nextel might redeem assets in exchange for cash or lines of credit, etc., and the manner by which Nextel would construct and operate facilities for which it does not possess a license
- The formation and operational documents of the Fund Administrator and the RCC and all other parties charged with any duty under the PWC plan, which parties do not presently exist
- A description of the due process rights of affected licensees during that period under which every affected licensee would be subject to the decisions of arbitrators, administrators, boards, and other private entities, presumably without the protections afforded them under Title 47 and the Commission's Rules.

The above list is not intended to be exhaustive, but rather illustrative, of the numerous issues which remain vague, unexplained, or too generally treated in the PWC plan to provide a basis for its adoption. Only by submission of these documents for review and comment by the interested members of the public would the agency be able, if at all, to adopt the PWC plan. In fact, SBT avers that the PWC's signatories' support for the plan is fully meaningless and given in ignorance without this information being included within the plan.<sup>7</sup> It takes less than a little imagination to foresee that

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<sup>7</sup> It is far, far easier to get persons to agree to a framework than an actual working document. The PWC's failure to produce those necessary working documents calls into serious question the validity of its coalition. In sum, there is no evidence that the signatories know to what they have tenuously agreed.

many of the signatories might easily reject specific portions of the above named documents if they were included within the PWC plan.

SBT further notes that if the documents and agreements outlined above had been presented, the Commission would quickly find that additional legal problems exist with the PWC plan, beyond the well articulated problem with basing a rule making on private contractual documents and largely unenforceable obligations. One example of the problems which would be well illustrated is the PWC's proposal that, "the RCC will prepare the necessary license applications" for affected licensees. Supplement at 22. These applications would be prepared based on the decisions of the RCC in rebanding each NPSPAC Region. Supplement at Ftn. 37. This proposal violates the rights of persons to choose and employ legal counsel, or to act *pro se*, to prepare their applications, which applications stand as a basis of obtaining legal authority to operate telecommunications facilities in accord with statute, rule and decisions of the agency. Under the PWC proposal, the applications would be prepared and submitted without regard to the directions of the licensees, but rather at the behest of the RCC in furtherance of its rebanding efforts. Even if those efforts were laudable, this usurpation of the rights of licensees is unsupportable under law. Additionally, one cannot help but be struck by the real possibility that an applicant might be put in a position of petitioning to deny an application with his own name on it.<sup>8</sup> Even well meaning administrative efficiency cannot go so far as to deny persons the right to counsel or the right to control the contents of documents submitted before the agency in their names.

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<sup>8</sup> One need only consider the havoc upon procedure and due process arising out of a "*Licensee v RCC dba Licensee*" case to appreciate the serious issues raised.

The Commission must also be made to wonder about the rights of the Fund Administrator or the RCC to bring suit against Nextel or its newly created entities who would stand as paper platforms for holding the 1.9 Ghz licenses. Additionally, will there exist any right in adversely affected licensees to bring suit against Nextel or its designees for failure to meet any pledge made to the Fund Administrator?<sup>9</sup> For those public safety entities which are under laws forbidding participation in binding arbitration, what manner of hearing will each be given regarding any relocation dispute resolution before the agency, and what due process rights will each be afforded? And, what happens if Nextel fails to meet any of its funding obligations! There is sonic reference to the sale of all or part of the 1.9 Ghz licenses by the agent/trustee to finance the completion of rebanding. However, there is nothing in the record which assigns a value to that spectrum, particularly in view of the PWC's reference to the cost of clearing that spectrum of its current occupants. For that matter, there is nothing in the PWC plan which articulates how Nextel intends to compensate the 1.9 Ghz licensees for its "use" of the licenses, either. There is only a vague reference to some diligent, cooperative effort to be made in the future following grant of the licenses to Nextel.<sup>10</sup>

For all of its efforts and pretensions of being comprehensive, the PWC plan is rife with questions, logical holes, unarticulated contract terms, undefined (or violated) rights of affected

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<sup>9</sup> See, 47 U.S.C. §§407 & 411, regarding the rights which should be deemed given to affected licensees in the unlikely event that the plan is adopted.

<sup>10</sup> The Supplement at page 35 states that Nextel "may be responsible for reimbursing UTAM for up to 25 percent of the cost of clearing form microwave licensees from the [UPCS] spectrum" but fails to explain the basis for this statement, including the percentage of compensation which the PWC claims Nextel might provide.

licensees, and generalities regarding material issues which require clarity for the purpose of appreciation by the agency following meaningful comment by the interested members of the public. Reasoned decision making requires that these facts, documents and information be supplied prior to adoption of the PWC plan; and the Administrative Procedures Act (APA) and its associated decisions clearly show that such information is essential for the Commission's consideration of adoption of the PWC plan.

Stated simply, the PWC's ex parte plan has not been "proposed" by the agency and, thus, has not been made subject to notice and comment by all interested parties. And if the PWC plan were proposed, as written, the agency could not expect to receive meaningful comment due to the gaps in logic, the lack of necessary facts, and the absence of expressed contractual duties within the Supplement. That the PWC requests that the plan be immediately adopted pursuant to Report and Order is beyond ambitious. It is procedurally and administratively fatal to its plans.

### **Notice and Comment Problems**

Ignoring for a moment that the Supplement appears to have been filed without agency invitation or authority, and is properly labeled "ex parte", the PWC's "take it or leave it" condition regarding the Commission's acting upon the PWC plan creates an additional legal hurdle for its adoption. The contents of the PWC plan, as articulated within the Supplement, were not borne of notice and comment. Only PWC members were allowed to make comment and assist in its creation. Accordingly, if the Commission were to adopt the plan under the condition created unilaterally by its members, the Commission would be accepting an extralegal method for engaging

in notice and comment rule making. In essence, the Commission would be abdicating to the PWC the work of rule making, allowing an exclusive, informal association to decide among itself, without contribution or comment from other non-member, interested parties, the nature of the agency's rules. The PWC plan demands the agency's rubber stamp, or rejection. Accordingly, if the agency acts to adopt *en toto* the PWC Supplement as rule or order, it will be acting in violation of the APA – yet, another legal difficulty created by the PWC's tenuous membership and each member thereof's highly conditioned support of the plan.

#### Flawed and Contradictory Premises

The PWC plan contains, nearly unarticulated, underlying premises which are flawed and which are glossed over by its emphasis on the general method of rebanding. The first flawed premise is that interfering operations by CMRS operations from low-site cellular facilities are somehow authorized operations. As fully articulated in its earlier comments within this proceeding, SBT avers that this premise is fully without reason or foundation.

The second flawed premise is that the land mobile community has a duty to both solve Nextel's and cellular operators' interference problems, while simultaneously "making Nextel whole" via support of Nextel's demand for the 1.9 Ghz licenses. The PWC never identifies the source of this duty. Certainly it does not arise under law or relevant, existing contract. Yet, the PWC plan again and again suggests that the land mobile community and the Commission have such a duty. Insofar as the record makes clear, the only source of this duty would be as a portion of a *quid pro quo* arrangement with Nextel pursuant to the PWC's capitulation to Nextel's demand for the 1.9 Ghz

spectrum. Therefore, no such duty exists. The PWC's echoing of Nextel's refrain does not create such a duty and any reliance upon the existence of such a duty for the purpose of furthering adoption of the PWC plan is wholly misplaced.

The PWC plan attempts to replace case-by-case remedial action and enforcement of the agency's existing rules and the mandates contained within Title 47 that direct the agency to act to resolve interference between operators, i.e. technical solutions, with sliced-of-light administration of the proposed rebanding. Only following rebanding would the PWC's proposed technical limitations be made effective. As a portion of its "take it or leave it" approach in offering its proposals, it appears that the PWC is stating to the Commission, "forget all efforts to cause cellular carriers and Nextel to take those actions necessary to correct and avoid interference until the completion of rebanding." This position is disastrous for systems which are presently receiving interference. The PWC plan provides little or no guarantee of relief from Nextel's OOB until a date situation at least four years in the future. An essential portion of the agency's NPRM was a request for solutions to immediate interference problems, as well as long-term solutions to avoid interference in the future. The PWC plan does nothing for the former and sacrifices the rights of licensees in attempting to deliver the latter.

The plan does not describe the type of relocation rights which are to be enjoyed by affected licensees. In its earlier rule makings,<sup>11</sup> the Commission demanded a seamless transition of operations. The PWC plan is premised upon, including its cost figures, many if not most of the

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<sup>11</sup> See, 62 FR 41217 (July 31, 1997)

relocation to be employed without a seamless transition, subjecting innocent operators to outages or denial of service to customers. The PWC does not justify its callousness toward those affected operators or why their rights should be less for the purpose of the PWC's proposals as compared to previous relocation efforts

Finally, the PWC plan is further premised on the members' collective belief that the \$850 million pledged by Nextel would not be better spent by Nextel to provide remedial efforts to avoid and correct interference problems. No where within the PWC plan is any showing of what the costs would be if Nextel were to commence a comprehensive effort to reduce and eliminate its systems' OOBs which are injurious to analog operations, including public safety operations. Such actions would be in fulfillment of Nextel's existing requirements under law and such activity should be commenced immediately, during the pendency of this rule making.

Although other commenting parties have addressed the premises discussed above, the PWC seems unwilling or unable to perform this basic examination of the rights and duties of affected licensees, manufacturers, end users, and the agency. In its articulation of its plan, the PWC either ignores each of these issues or relies, instead, on factually unsupported conclusions to gloss over its failure to treat these issues. But each of these issues is material and proper treatment of each of these issues will assure that whatever result occurs from this rule making will be the result of a comprehensive exploration of the complex matters raised.



### Logical, Legal, And Equitable Problems

The PWC plan calls for Nextel to voluntarily contribute \$850 million, over time, into a fund to be administered by a collection of the PWC members. Presumably, none of that money would come from NPI or from the cellular licensees. One might, at this juncture, be tempted to laud Nextel for its extreme generosity in providing that funding, until one considers that the cost of obtaining that funding is the 10 MHz of spectrum at 1.9 Ghz and the rebanding of thousands of systems to accommodate Nextel's interference problems. Which leads one to another issue, the amount of that \$850 million funding which would go toward rebanding the NPI systems. The PWC plan does not make clear the percentage of the funds which would be devoted toward compensating NPI to assist one of its creators in reaching its business goals. Further, the PWC plan does not explain why an accommodation is being offered to Southern LINC that is not also being offered to NPI. The presumption is that Southern LINC's system is not a source of interference to public safety operators, despite its iDen architecture, whereas NPI's systems create injurious OOB in the same manner as Nextel. But this issue is not explained by the PWC. If, as the plan suggests, NPI is being compensated out of the \$850 million, then a material amount of the \$850 million would be employed to compensate an entity which is one of the sources of the cited interference. This dilution of the funding, which is intended to assist analog operators, to reward an interfering party is simply inappropriate.

However, if the Nextel funding does not include compensation to NPI, additional problems exist. NPI has not participated in this proceeding and has not, therefore, consented to its being made to pay for its own relocation. Adoption of the PWC plan may result in a Commission order that, in

effect, requires NPI to pay for its own relocation, thus imposing a separate class on NPI without legal or logical justification. Therefore, the Commission is provided a “hobson’s choice” within the PWC plan. Either the funding proposed has not been shown to be sufficient or, perhaps, equitably considered regarding the costs to NPI. Or the plan would impose a costly and unwelcome and legally unjustified burden on NPI. In either event, the plan fails.

The funding proposal is capped at \$850 million and the adverse and potentially disastrous effects of capping have already been discussed *supra*, and in earlier comments. However, this time the PWC has attempted to show that its newly calculated amount is sufficient to complete the rebanding effort by compiling data from not-wholly-identified sources, to arrive at its figure. The problem is that the figure produced is fully at odds with the costs expressed by all other commenting parties. The following entities have estimated their individual costs of rebanding in accord with the PWC plan:<sup>12</sup>

Intel	\$4,500,000
Boeing	\$50,000,000
NYCT	\$3,000,000
BART	\$3,250,000
DART	\$30,000,000
Harris County	\$40,000,000
Jones Oslow	\$15,000
White County REMC	\$61,400
East River	\$3,600,000
Holy Cross	\$1,564,000
KVREMC	\$350,000
Washington EMC	\$230,496
Consumers	\$55,000,000

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<sup>12</sup> Many commenting parties within the proceeding who opposed the PWC plan did not provide estimates of costs to themselves or the members of whatever organization the commenter represented.

NRECA	\$20,000,000
SCANA	\$61,000,000
Entergy	\$100,000,000
AEP	\$60,000,000
Cinergy	\$35,000,000
Total:	<b>\$522,570,896.00</b>

Although the above estimates and the companies represented thereby equal a material amount of the funding necessary to effect the PWC plan, the list is not exhaustive by any means. Most notably, the cost of relocating public safety systems is not included,<sup>13</sup> nor is the cost of relocating the NPI channels. However, the individual estimates made by those commenting parties, with fully informed and unique knowledge regarding those costs expected to arise in their acting in accord with the PWC plan, cannot be reconciled with the PWC's estimates. Nor can the PWC's estimates be reconciled with the PWC's earlier comments which placed the price tag for relocation at double the estimates given in the Supplement. Finally, the PWC estimates cannot be reconciled with the estimates provided by Motorola, Inc. in this proceeding, which set the cost of rebanding at over \$2 billion. In effect, therefore, the PWC's Supplement stands alone as the only set of comments which suggests that rebanding can be accomplished at the extremely low cost estimates contained therein. And if, assuming *arguendo*, the PWC estimates, as is fully demonstrated by the vast majority of commenting parties' estimates, are incorrect and that the cost is quite higher than the \$850 million funding proposed, adoption of the PWC plan with its funding cap will result in an incomplete relocation of licensed operations. SBT avers that half a rebanding is worse than none.

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<sup>13</sup> Previously estimated by commenting parties as costing in excess of \$1 billion.

The Commission need only consider the effect on the goal of obtaining greater interoperability among public safety entities. to quickly discern that a half relocation would be horrible. Consider the effect of: (i) sonic NPSPAC operations located to another position within the band, while others await (perhaps forever) relocation until the financing is assured; (ii) sonic equipment purchased or manufacturing plans commenced, only to find that the financing for purchase and installation has dried up; (iii) some transitions begun but not able to be completed; and (iv) sonic public safety budgets made whole via compensation, while others are rendered fiction by an inability to make enforceable Nextel's voluntary participation. The PWC plan calls only for some assurances regarding estimates to complete relocation on a NPSPAC Region by NISTAC Region. It does not address the problems which will arise if those estimates are incorrect. And there is no contingency if the funding vehicle is unable to deliver or simply disappears. It is, therefore, apparent that the risk of proceeding falls squarely on public safety operations and their ability to rely on Nextel's voluntary financial manipulations. This risk is too high to accept and should be rejected by the agency.

This funding debate aside, the PWC plan makes claims that are not fully articulated and which require greater fleshing out prior to any hope of adoption of the plan. For example, at page 13 of the Supplement, the PWC states that "Nextel will contribute a running average of 2.5 MHz at 800 MHz for accommodating the relocations of non-cellularized systems and for making additional 800 MHz spectrum available for public safety communications systems." How and to whom will this contribution be made? Who will provide oversight to this effort? Under what authority? What is the definition of the term "running average" as that term is used within this claim? What

enforceable duties will exist to assure Nextel's compliance with this claim'. Is this again a voluntary effort, unforced participation or compliance may be withdrawn at any time'? Will this "promise" be reduced to contract? What is the identity of the contracting parties? And, is the PWC recommending that this element of its plan be codified or ordered by decree of the Commission? If so, what is the suggested statutory authority upon which the agency will rely in making such an order or creating such a rule? Again, the PWC makes general statements and claims that are not supported by facts, rule or law. And against this backdrop of sweeping claims of solutions, the PWC has avoided the necessary job of dealing with the essential details, not the least of which is the statutory authority of the agency and the rights of affected licensees.

At page 15 of the Supplement, the PWC plan recommends that oversight for execution of its plan be placed in the hands of the RCC, which is to be made up of four members of the LMCC and Nextel.<sup>14</sup> The extra-legal nature of this group is in serious question under any circumstances given the sweeping authority it is attempting to reserve to itself under the PWC plan. However, it does not go beyond notice that the PWC is mainly comprised of LMCC members (although not all) and Nextel. Where, therefore, will be the checks and balances to assure fair operations of the RCC? The majority of the LMCC supports the plan and certainly Nextel's interests are accommodated by the intended efforts of the RCC. But what voice on the RCC will speak for those who are not

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<sup>14</sup> SBT presumes that the participants in the RCC are relying, to some undefined extent, on that authority arising out of certification as frequency coordinators. Putting aside the fact that those certifications do not include the duties proscribed within the PWC plan and place the agency outside the dictates of its statutory authority for use of frequency coordinating services; the inclusion of Nextel in the process is clearly without authority. Nextel is not a frequency coordinator and, thus, its participation in the process is without any statutory authority.

committed to Nextel's agenda via participation in the PWC plan? The PWC offers none. If ever a group required the assistance of balanced decision making via the inclusion of the "loyal opposition," the RCC certainly does. This problem is exacerbated by the operations of the proposed Planning Committees which would have only three members, including Nextel, one public safety coordinator and one B/ILT coordinator.<sup>15</sup> Nextel's influence is, thus, increased in the operation of the Planning Committees and likely assured with the two-to-one majority guaranteed by the inclusion of a public safety coordinator which must almost certainly be one of the PWC signatories

In what must be viewed as near irony, the make-up of the Planning Committees is defended by the PWC in its statement that, "[t]he experience and reputation of the Phase I Planning Committee members is important to ensure that incumbent licensees have a high degree of confidence that their interests are being considered in the channel relocation." At the risk of putting too fine a point on this issue, incumbent licensees are looking for persons to represent, not merely "consider" their interests. And the nature of consideration which incumbent licensees would likely receive by a group made up of PWC adherents and Nextel is unlikely to merit a "high degree of confidence."

The above problem of representation on the PWC's proposed committees is not immaterial, given the fact that these committees would not appear to be subject to any appeal, oversight or even effective guidance by affected licensees. The nature of their proposed activities, in the abstract provided by the PWC, is draconian. No other presumption is possible given the PWC's failure to include any discussion of the procedures to be employed by the committees, the rights of the

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<sup>15</sup> See, Supplement at 18

individual committee members to oppose any specific plan, the rights of affected licensees to present themselves to the committee, the legal effect or nature of the committees' decisions, and the authority under which the agency would adopt rules which rely on the existence and operation of such committees, particularly in view of the paucity of recognition by the PWC to the due process rights of the agency's regulatees.

At page 21 of the Supplement, the PWC sets forth the method of resolving disputes between Nextel and affected licensees, advocating binding arbitration to settle issues regarding "timing", "costs, and "a specific relocation plan." The nature of the binding arbitration would be, in the PWC's words, "baseball-style," with the arbitrator choosing among the proposals but not adding to or amending the content of the chosen proposal.<sup>16</sup> Presumably, the issue of channels to be employed for relocation has already been decided by the Planning Committee, and its decision is not subject to arbitration, but merely administrative fiat and certification by the committee.<sup>17</sup> Ignoring for a moment the problem with public safety entities which are precluded from participating in binding

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<sup>16</sup> The PWC does not suggest that its unusual arbitration method produce published results, available to all incumbent licensees. Since Nextel will be privy to each, it is reasonable to provide a similar advantage to each incumbent licensee. However, again the PWC has only concentrated on expeditious methods of accommodating Nextel without regard to the rights of affected innocent licensees.

<sup>17</sup> The PWC does not fully address the legal effect of the RCC's "certification" of its rechannelization plans, however, by the effects which are described, it appears that the RCC's actions would be tantamount to licensing, combined with spectrum management duties, which activities are within the exclusive jurisdiction of the agency. More incredibly, the PWC would also add a presumption of approval within the public interest to any application received by the agency (and which is, by PWC command, prepared by the RCC) which application reflects the certified plan. Supplement at 23. This requirement as a portion of the PWC plan clearly demonstrates that the PWC wishes the agency to only rubber-stamp the RCC's efforts.

arbitration, the IWC has not shown any statutory authority in the agency for ordering this type of arbitration procedure. This is particularly troublesome since it restricts the nature of the proposed proceeding by reducing the rights of the participants to something less than each might receive before the Commission. And since the IWC plan does contemplate that some incumbent licensees could avail themselves of a Commission hearing, rather than being subjected to private, binding arbitration, the question is begged as to how the PWC might legally and equitably justify two different acts of procedural guidelines among equally situated licensees, employing two different timetables for completion.<sup>18</sup>

Oddly, the IWC does not even resolve the issue of whether the costs to be determined at arbitration are to be reimbursed or paid directly by the Fund Administrator, so presumably the source of the funds initially is also subject to the arbitration procedure advocated by the IWC. Nor does the PWC provide any definition to its use of the phrase, describing the type of relocation which incumbent licensees might expect. "designed to prevent significant disruption of its operations," Supplement at 21. which disruption avoidance could easily impact materially the costs of rebanding. The suggestion is that the IWC is willing, under unidentified circumstances, to allow incumbent licensees' systems to be rendered unusable for some period of time, without regard to the adverse economic or competitive effect of such occurrences. Yet, within the same plan the PWC has not advocated that a single Nextel facility ever be rendered dark for any period of time and one can be

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<sup>18</sup> In fact, the PWC proposes more than two levels of procedural rights guiding affected licensees' actions, if one considers the Southern LINC exception, the unarticulated participation by NPI, the interest in the outcome created by Nextel's cloned 1.9 Ghz licensees and the separate interest of the Fund Administrator, the Commission, lower channel non-Nextel EA licensees, etc.



reasonably certain that Nextel would protest vehemently if any commenting party suggested that its cells be rendered incapable of providing service to customers for, say, a 48-hour period. Accordingly, the PWC's guidelines for arbitration must be found as improperly pre-skewed in favor of Nextel.

As further evidence of the PWC's Nextel bias, the PWC states that relocation under Phase I "must be completed within six months of the Commission approval of the incumbent licensee's new channel assignment." Supplement at 23. The PWC does not state what action should be taken by the Commission if this deadline is not met, but presumably the burden for untimely relocation will fall on the incumbent licensee. This stick to beat forward incumbent licensees to meet the arbitrary schedule produced by the PWC is indicative of the nature of the entire PWC plan, which puts a terrific premium on timeliness, but a very low premium on due process and fundamental fairness. Even the agency is not immune to the speed of the express train upon which the PWC rebanding would occur. At Footnote 39 of the Supplement, the PWC states, "[a] 60-day processing period leaves time for 30-days Public Notice and ample time for Commission consideration of any Petitions To Deny on the limited issues involved in each application." Assuming the normal pleading schedule for such matters, including mailing time, one is hard pressed to envision how the PWC's 60-day time period is workable, without denying additional procedural and due process rights to interested parties. The PWC plan does not afford the time for reasoned decision making by the agency following thoughtful consideration of the pleadings. But, no matter insofar as the PWC plan is concerned, the "limited issues" presumed by the PWC plan evince an intention to create a *fait accompli* by leveling a burden of proof on petitioners that is unlikely to ever be overcome, despite

the fact that creation of such a burden would be without legal or procedural support. The PWC's cavalier attitude toward the rights of incumbent licensees may be intended to produce administrative efficiencies of the highest order, but efficiency alone is not the goal of the agency. It must be balanced against the rights of licensees. The scales of justice for the PWC may be an obvious annoyance, but the Commission is not empowered to be equally flippant in its treatment of legitimate operators including steam-rolled public safety entities.

In its boldest proposal the PWC states that, "[t]o ensure that relocation proceeds as planned, the Consensus Plan provides for the Commission to cancel the license of any 1-120 channel block incumbent in NPSPAC regions prioritized 1-14 not executing a relocation agreement within 13 months of the Report and Order, unless the incumbent is involved in arbitration [or Commission administrative process]." It seems of little or no concern to the PWC that this portion of its plan is contrary to the rights of licensees pursuant to 17 U.S.C. §303(m) which limits the Commission's ability to suspend or cancel a license without providing to the affected licensee an opportunity for hearing. It also appears to have escaped the PWC's notice that this harshest of events would only be visited upon incumbent licensees, presumably not Nextel, therefore the PWC is creating punitive incentives for the specific benefit of Nextel. SBT can contemplate no circumstances under the PWC plan whereby Nextel would also be threatened by such action, yet, Nextel's cooperation and the Fund Administrator's financing and the vagaries of unforeseen circumstances might all contribute to a

delay in rebanding.<sup>19</sup> No matter, the Commission is directed by the PWC to cancel the incumbent licensee's authorization immediately following the passage of its arbitrary deadlines.

The Commission is also directed to cancel the license of any incumbent licensee which refuses to relocate within six months of the grant of its application. Supplement at 24. The underlying logical and legal problem is that the application is not the applicant's. The application is prepared by the RCC pursuant to the directions of a Planning Committee, neither of which has any procedure for securing the licensee's approval prior to creating and submitting the application on the licensee's behalf. Accordingly, the "application", such as it is, is not the action of the licensee, has not been prepared or submitted by the licensee, has not been approved by the licensee, contains no consent prior or following its preparation obtained by the licensee, and, thus, is not truly an application as that term has been defined for decades. That document, electronic or otherwise, has no legal meaning to the licensee and the agency cannot subscribe to that document any procedural or substantive treatment that might be deemed to convert it to an application filed by the licensee. Accordingly, the creation of a license via grant of the document would be entirely inappropriate for the agency. Moreover, any entity acting in reliance upon such a document would be participating in an abuse of the Commission's processes which are created to assure that the claims, statements, warranties, and promises given in the application process are those of the entity who stands as

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<sup>19</sup> At Footnote 50 of the Supplement, the IWC does recognize that circumstances may exist which preclude timely relocation by public safety entities, therefore, justifying an extension of time. The IWC does not explain why private radio licensees are immune to the problems which might be visited upon public safety entities.

licensee. In the manner proposed by the PWC, the contents of the application are those of a Planning Committee or the RCC, not the person to be bound by the contents thereof.

As clearly shown above, the logical, legal and equitable problems contained within the PWC plan are insurmountable. It is not a question of one oversight or inadvertent omission which might be brought into true with law. It is the fact that there is no effort by the PWC to reconcile any of its plan with the clear dictates of Title 47 and the agency's existing rules. Rather, the PWC is engaging in legal fantasy, pretending that the agency has limitless authority and jurisdiction; and that incumbent licensees are without statutory or codified rights. SBT recognizes that the PWC agenda has been fully coopted by Nextel and its business agenda, however, even in its subservient role the PWC should give a passing consideration to due process and fundamental fairness while it is designing methods for fast-tracking its bizarre form of justice.

#### Nextel's Use Of The 900 MHz Band

SBT will not repeat herein its earlier comments regarding Nextel's highly questionable title to its 900 MHz licenses, except to note that the PWC plan does not appear concerned with the manner by which Nextel obtained and maintained its licenses. SBT will leave it to the Commission to take appropriate actions pursuant to SBT's earlier comments in assuring that fidelity to its processes was provided by Nextel in those false claims made to produce the waiver of Nextel's construction period.

However, SBT does question the PWC's statement that "it is crucial that Nextel is able to operate at 900 MHz during the realignment implementation process." Supplement at 33. This sweeping statement is fully unsupported by any facts or data upon which it might rest. A review of the few 900 MHz systems currently operated by Nextel in the market suggests that those systems are analog systems, therefore, not capable of being employed as an augmentation to Nextel's 800 MHz digital, iDen system. Additionally, the Supplement does not explain the logistics involved in the continued operation of Nextel's 900 MHz facilities, either as currently constructed or following the agency's issuance of the proposed order to ratify the PWC plan.

Present customers on Nextel's systems cannot suddenly receive signals at 900 MHz. Their handsets cannot receive those signals. So the proposed use of 900 MHz channels for this purpose is fully illusory. Future users may have available some form of dual-band equipment from Nextel, but if Nextel is intending to invest in these units and the associated system including software to implement this strategy, Nextel is advocating economic waste in the millions of dollars. In essence, Nextel proposes that the agency ratify this economic waste by allowing Nextel to maintain authority for 900 MHz systems to be employed as a type of short-term, stopgap method; which method defies rationality. Finally, the Commission would be supporting Nextel's sale and distribution of dual-band radios to end users who are made to pay the cost of this exotic equipment, even though the equipment will only be dual-band functional for approximately three years under the PWC plan. Therefore, the economic waste is not confined to Nextel, but is shared with its end users.

The Commission must also wonder whether the proposed use of 900 MHz equipment by Nextel, to temporarily provide additional, digital iDen service, will result in a duplication of the problems suffered at 800 MHz visited upon existing 900 MHz analog operators. This potential is not addressed within the PWC plan and there exists no protections against this eventuality. One would be hard pressed to claim that reasoned decision making would include trading interference within one band for interference within another.

#### Greater Financial Assurances Are Required

Despite the PWC's questionable approach in calculating the cost of its scheme, one is left to wonder whether Nextel can, in fact, pay the full freight of adoption of the plan. For if there is serious doubt, the practical effects of this doubt are obvious – the Commission cannot accept the plan due to a lack of reasonableness. Therefore, the issue presented is, is Nextel capable of financing the following within five years of any report and order adopting the plan? \$850 million in relocation costs (assuming this amount is capped); over \$1 billion to construct the 1.9 Ghz systems; several millions to launch and operate a dual-band 800/900 MHz system, to be later abandoned; return of the 700 MHz guardband channels; return of the 900 MHz channels; reduction in its 800 MHz holdings; cost of interest to service any debt created to accomplish the foregoing; cost of reengineering its systems to comply with the technical requirements of operation post-rebanding; and tens of millions in administrative, legal, engineering, site rental, and other associated costs in Nextel's (and perhaps NPI's) performance. Since none of the foregoing investments have been demonstrated by the PWC to be capable of producing any additional revenue in Nextel, the question is then, can the estimated \$3 billion reasonably be, without risk or speculation, found in Nextel's

existing or expected coffers for the purpose of providing those necessary assurances of success that each and every public safety entity commenting in this rule making has stated is of greatest priority? Of all the illogical or unsupported premises upon which the PWC plan is built, unquestioning reliance upon Nextel's present and future financial condition may be the most dangerous and irresponsible. And the PWC members have not created any contingency that would guard against a negative outcome. Instead, they would place the risk of failure squarely upon thousands of affected licensees, whose business plans and actions and reliance would be fully implemented before disaster struck.

### Conclusion

The PWC has stated to the Commission that its plan, as articulated within the Supplement, must be accepted by the Commission without material change or the plan must be deemed unreliably supported by its signatories. However, as clearly shown above, the PWC plan cannot be accepted "as is". It is lacking in legal foundation. It is blind to and inconsistent with the rights of incumbent licensees which rights are protected by federal statute. It is lacking in necessary specifics regarding the contractual rights and duties among Nextel, the proposed 1.9 Ghz licensees (and the agent/trustee of the licensees' shares of stock), the Fund Administrator, the RCC, the Planning Committees, and affected licensees. It is violative of the Commission's long established rules and decisions relevant to licensing and making application to the Commission. It will result in economic waste. It is bereft of consideration of due process under law. And, it fails to provide necessary funding assurances. In the final analysis, it fails.

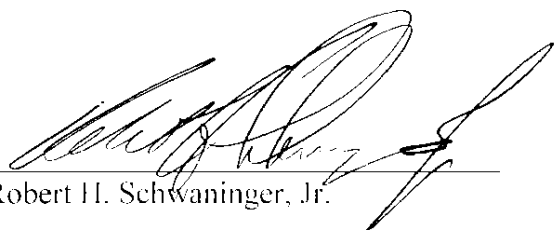
Perhaps its greatest failure is that it never moves beyond the voluntary to the enforceable. At no juncture has the PWC requested, for examples, that the Commission order Nextel to pay \$850 million dollars; order NPI to pay the cost of its own relocation; order licensees to waive their protections granted under 47 U.S.C. §303; order licensees to rely on the Nextel-provided funding source until that funding proves inadequate; or order Nextel and its newly created 1.9 Ghz licensees to enter into contracts to secure funding. Instead, the PWC plan requests that the Commission simply recognize the PWC's intentions, however, do nothing other than provide to the plan members the right to engage in rebanding, spectrum management, licensing, application preparation, arbitration, collection and distribution of funding, and a host of other functions which are within the exclusive jurisdiction of the agency or for which even the agency does not possess the necessary statutory authority. The PWC would do all of this, without color of law or even reference thereto; and in so doing would give the lowest priority to the rights of affected analog licensees and the existing obligation of Nextel to avoid and correct harmful interference. In sum, the PWC members are asking the agency to grant it authority that the agency itself does not possess and to provide to the plan members the ability to violate the rights of licensees in a manner which could not occur within an agency setting. The unreasonableness of this request is, therefore, apparent.



For the reasons stated above and within its earlier comments submitted within this proceeding, SBT respectfully requests that the Commission reject the PWC plan in favor of directing Nextel and other cellularized operators to take those required steps to avoid and correct interference caused by the operations of their systems consistent with those comments filed by SBT in this matter.

Respectfully submitted,

SMALL BUSINESS IN TELECOMMUNICATIONS

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## **CERTIFICATE OF SERVICE**

I, Ava Leland, hereby certify that on this 10<sup>th</sup> day of January, 2003, I caused a copy of the foregoing Comments of Small Business In Telecommunications to Supplemental Comments of the Consensus Parties to be served by placing a copy in the United States mail, first class, postage prepaid to the following:

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